EON BANK BHD

v.

MOHD FAISAL SAIDUN & ANOR

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[CIVIL APPEAL NO: 12-57-2004]
21 NOVEMBER 2005

HIRE PURCHASE: *Hire purchase agreement - Guarantee - Section 5(1) and s. 5(1A) Hire-Purchase Act 1967 - Whether failure of owner to serve hire purchase agreement can render guarantee unenforceable*

HIRE PURCHASE: *Breach of agreement - Claim against guarantors - Guarantor's liability separate and independent of hire-purchase agreement*

The appellant/plaintiff ("the plaintiff") claimed against the respondent/second defendant ("D2") as a guarantor pursuant to a guarantee executed by D2 in favour of the plaintiff in consideration of the plaintiff granting hire-purchase facilities to the first defendant ("D1") under a hire-purchase agreement executed between D1 and the plaintiff. D2 had guaranteed as principal debtor. Later the plaintiff issued notices of demand against both the defendants claiming the outstanding amounts. D1 did not dispute the outstanding sum and judgment thereon was obtained by the plaintiff against D1. D2 filed his statement of defence. The learned sessions court judge dismissed the plaintiff's application for summary judgment against D2. The plaintiff appealed against this decision. D2 claimed that there was a triable issue *ie*, that the plaintiff had failed to serve a copy each of the hire-purchase agreement and the guarantee on D2 under s. 5(1) of the Hire-Purchase Act 1967, thereby rendering the hire-purchase agreement unenforceable under s. 5(1A). The plaintiff claimed that the plaintiff had sent by registered post a copy of the hire-purchase agreement to D1 and a copy of the guarantee to D2.

Held (allowing the appeal and entering summary judgment for the plaintiff):

[1] D1 did not dispute the service of the two documents on him, as a result of which judgment was obtained against D1. The enforceability of the hire-purchase agreement remained a non-issue. Section 5(1A) did not render the guarantee unenforceable. The rights and obligations of the guarantor were to be found in the guarantee. (pp. 110 h & 111 a)

[2] Clause 2 of the guarantee made it clear that the guarantor's liability continued to subsist notwithstanding the invalidity or unenforceability of the hire-purchase agreement. The guarantor's liability was separate, distinct and independent of the hire-purchase agreement. (p. 111 d)

Case(s) referred to:
Gan Koo Kea v. Gan Shiow Lih (f) [2003] 4 CLJ 539 HC ***(refd)***
Kho Ah Soon v. Duniaga Sdn Bhd [1996] 2 CLJ 218 SC ***(refd)***
Malaysian Finance Corp Bhd lwn. Quality Tractors (M) Sdn Bhd [1989] 3 MLJ 504 HC ***(refd)***
Sunrise Sdn Bhd v. Fist Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***
Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***

Legislation referred to:
Hire-Purchase Act 1967, ss. 4, 5(1A), 6(2)
Subordinate Courts Rules 1980, O. 26A

For the 2nd defendant - Ramzani Idris; M/s Haresh Mahadevan & Co
For the plaintiff - Kung Oi Fah; M/s Lee Boon Peng & Co

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant-plaintiff ("the plaintiff") against the decision of the learned sessions court judge who had on 6 May 2004 dismissed with costs the plaintiff's application in encl. (19) for summary judgment against respondent-defendant 2 ("D2") under O. 26A of the Subordinate Courts Rules 1980.

Factual Background

The plaintiff's claim is against D2 as a guarantor pursuant to a guarantee executed by D2 in favour of the plaintiff in consideration of the plaintiff granting hire-purchase facilities to the first defendant ("D1") under a hire-purchase agreement executed between D1 and the plaintiff ("the hire-purchase agreement").

There was no dispute as to the execution of the hire-purchase agreement and the guarantee.

Pursuant to the guarantee, D2 has agreed, *inter alia*, to guarantee as principal debtor, and not merely as a surety, upon written demand being made to D2 by the plaintiff, the due and punctual payment of all sums which may become due to the plaintiff under or arising out of the hire-purchase agreement and the due performance and observance of the hirer ie, D1.

As at 23 October 2002, the amount outstanding due and owing by D1 to the plaintiff was RM27,911.57. This sum was contained in the certificate of indebtedness dated 7 October 2003 at p. 65 of the appeal record, issued by the plaintiff's manager and supported by the statement of account at pp 91 to 98, ibid, to both the defendants.

On 22 November 2002, the plaintiff through its solicitors sent notices of demand to D1 and D2 respectively claiming the outstanding sum of RM27,911.57, particularised therein.

D1 has not disputed the outstanding sum and judgment thereon has been obtained by the plaintiff against D1 on 28 August 2003. D2 has filed his statement of defence.

Service Of Agreements

D2's learned counsel Mr. Ramzani bin Idris submitted that there is a triable issue ie, the plaintiff has failed to serve a copy each of the hire-purchase agreement and the guarantee on D2 under s. 5(1) of the Hire-Purchase Act 1967, thereby rendering the hire-purchase agreement unenforceable under s. 5(1A).

Miss Kung Oi Fah, plaintiff's learned counsel submitted that the plaintiff has on 10 June 1997 sent by registered post a copy of the hire-purchase agreement to D1 and a copy of the guarantee to D2 and that the receipt from Pos Malaysia Bhd was annexed to the plaintiff's affidavit, which D2 has not disputed in his affidavit in reply, in which case, D2 is deemed to have admitted it, referring to *Sunrise Sdn Bhd v. Fist Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529 FC.

She added that both the hire-purchase agreement and the guarantee are enforceable, relying on cll 2 and 3 of the guarantee; and *Malaysian Finance Corp Bhd lwn. Quality Tractors (M) Sdn Bhd* [1989] 3 MLJ 504 HC.

The above submissions render it necessary for me to peruse D2's affidavit in reply affirmed on 13 February 2004.

Para 3 of D2's affidavit in reply stated that he has never been given a copy of the hire-purchase agreement and the guarantee. It is therefore not correct

to say that D2 has not disputed the averment in the plaintiff's affidavit. Hence, the authority cited for the plaintiff ie, *Sunrise Sdn Bhd*, *supra*, would have no application.

In the face of such conflicting versions, my duty is to ignore the disputed facts and decide on undisputed facts. This important point of practice in civil litigation has been succinctly stated by Lord Templeman for the Privy Council in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 at p. 444 (p. 28) in the following words:

> At the end of the day, the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

The above Privy Council advice was followed by our Federal Court in *Kho Ah Soon v. Duniaga Sdn Bhd* [1996] 2 MLJ 181 through the judgment of Peh Swee Chin FCJ (as he then was) at p 187; and by me in *Gan Koo Kea v. Gan Shiow Lih (f)* [2003] 4 MLJ 770 at 775A-D.

In the circumstances, my judgment shall be confined only to the consideration of undisputed facts affirmed in the affidavits filed herein.

The undisputed fact herein is that the plaintiff has not annexed any covering letter stating that the hire-purchase agreement and the guarantee had been served on D2. The legal implication arising therefrom may be ascertained by reference to s. 5(1) and (1A) in the following words:

> (1) Within fourteen days after the making of a hire-purchase agreement, the owner shall serve or cause to be served on the hirer and guarantor a copy of the agreement each.
>
> (1A) Failure to comply with subsection (1) would render the hire-purchase agreement unenforceable by the owner.

In my view, the effect of s. 5(1A) is to render the hire-purchase agreement unenforceable by the owner ie, the plaintiff herein if the hire-purchase agreement and the guarantee had not been served on the guarantor D2 in accordance with the provisions of s. 5(1).

However, the matter does not stop there, as the hirer D1 does not appear to have disputed the service of the two documents on him, as a result of which judgment has been obtained against D1 on 28 August 2003. As that is a legally

binding and final judgment which has not been set aside either on appeal or on application by D1, the enforceability of the hire-purchase agreement remains a non-issue. Be it noted that s. 5(1A) does not render the guarantee unenforceable. That being the case, the rights and obligations of the guarantor are to be found in the guarantee.

That brings me to the construction of the pertinent clauses in the guarantee. cls. 2 and 3 therein merit reproduction as follows:

> 2. I agree and declare that my liability under this guarantee shall not in any way be discharged, diminished or affected by the invalidity or unenforceability of the hire purchase agreement ….
>
> 3. I shall on written demand pay to you all loss or damage you may sustain under the said hire purchase agreement whether or not such loss or damage results from the commission of any breach by the hirer and whether or not you have any legal right to claim against the hirer for such loss or damage or have availed yourself of your legal remedies against the hirer or the goods comprised in the said hire purchase agreement.

Clause 2 makes it abundantly clear that the guarantor's liability continues to subsist notwithstanding the invalidity or unenforceability of the hire-purchase agreement. The guarantor's liability appears to be separate, distinct and independent of the hire-purchase agreement.

Under cl. 3, the guarantor's liability arises on the owner's ie, plaintiff's written demand to the guarantor ie, D2 to pay all loss or damage sustained by the plaintiff under the hire-purchase agreement. As has been stated above, this has been complied with by the plaintiff.

The plaintiff's case is further strengthened by the legally binding and final judgment it has obtained against D1, for whom D2 has become not only his guarantor but also the principal debtor under the guarantee.

In *Malaysian Finance Corp Bhd, supra*, the second, third, fourth and fifth defendants had agreed to indemnify the plaintiff against losses suffered by the plaintiff as a result of the failure of the first defendant, the hirer, to pay the amounts under a hire-purchase agreement. The first and fifth defendants had become bankrupt and the third defendant was untraceable. The action was therefore heard against the second and fourth defendants who claimed that the plaintiff had not complied with the requirements of ss. 4 and 6(2) of the Hire-Purchase Act 1967, and that the hire-purchase agreement was unlawful as a result of which they were not liable as guarantors. Abdul Razak J (as he then was) rejected that contention and held that the first defendant was liable for all losses suffered by the plaintiff no matter how they arose and consequently the second and fourth defendants were liable as guarantors.

Reverting to the facts and the law in this appeal, I am of the view that the above contention presented for D2 does not give rise to a triable issue and the plaintiff is entitled to summary judgment.

Conclusion

On the foregoing grounds, I hold that the learned sessions court judge has erred in dismissing the plaintiff's application for summary judgment against D2. I therefore allow this appeal and enter summary judgment for the plaintiff in terms as prayed in the plaintiff's application in encl. (19). Costs of this appeal to the plaintiff.